defendant but he had himself brought about the unfortunate position he found himself in. He signed the agreement with open eyes and there is nothing to indicate that he was not aware of its terms and conditions. Between the plaintiff and defendant I have no hesitation in accepting the evidence of the plaintiff.

For reasons given I give judgment on the claim for plaintiff with costs. I dismiss the defendant's counterclaim with costs. Defendant must vacate the premises at the Bukit Lima Swimming Pool, Sibu. He is entitled to a reasonable time for removing his property and winding up his business. Defendant is ordered to vacate from the premises on or before 31st December, 1964. Defendant is further ordered to pay the licence fee at the rate of $160 per month up to 30th September, 1964 less amount already paid and damages at the rate of $160 per month up to the time he vacates the premises.

Claim allowed. Counter-claim dismissed.

LEE YUNG KIANG v. LING YUN TIE

[O.C.J. (Lee Hun Hoe J.C.) December 12, 1964]

[Kuching — Matrimonial Cause No. K 23 of 1964]

Husband and wife — Dissolution of marriage — Foochow custom — Desertion — Maintenance — Custody of children — Chinese Marriage Ordinance.

The petitioner left his family in Sibu and went to work in Kuching but he took no steps to set up a matrimonial home there. Subsequently the wife also left the family house and went to work as a cook at a religious association in Sibu without the petitioner's consent. The petitioner then applied for the dissolution of his marriage on the ground of desertion and asked the court for the custody of their 3 children (i.e. 2 daughters and a son). The respondent denied desertion and claimed maintenance and the custody of the 3 children.

Held: (1) on the facts the petitioner had failed to establish that the respondent had the intention to desert and therefore the petition must be dismissed;

(2) the petitioner should pay to the respondent and his 2 daughters $50 a month as maintenance with effect from December 31, 1964 and thereafter $50 a month at the end of each month;

(3) the son should be given to the custody and care of the petitioner and the 2 daughters in the custody and care of the respondent.

Cases referred to:—

(1) *Milligan* v. *Milligan* [1941] P. 78.

(2) *Pulford* v. *Pulford* [1923] P. 78, 83.

PETITION.

Parties in person.

Lee Hun Hoe J.C.: The parties are both of the Foochow community. They were married according to their custom on 22nd October, 1956. The marriage was registered under the Chinese Marriage Ordinance. They have three children. Two of them, both girls, are with the respondent. The youngest one, a boy, is with the petitioner.

The petitioner, a barber, prays for the dissolution of the marriage on the ground of desertion and asks the court for custody of the three children. In her answer respondent denies desertion. She does not cross petition for divorce but claims maintenance and also asks for the custody of the three children.

It seems to me that the marriage began to crack when petitioner left Sarikei for Kuching in November, 1962 after he was asked by his mother-in-law to leave the alleged partnership business. In Kuching he went into partnership with three others and operated the "Lucky Beauty Saloon" at No. 61, Main Bazaar. Respondent and the three children were left at Sungei Ensurai, Sibu to live with the families of petitioner's two brothers. Before he left for Kuching he gave respondent $150 through his uncle. Three months later he sent respondent $200. Since then he sent no more money. Respondent spoke to her mother-in-law (D.W.3) about her difficulty and informed the latter she would like to work. She was engaged as a cook at the Ming Sing Tong, Sibu, where D.W.3 had lived for over 14 years. I understand that Ming Sing Tong is a kind of religious association. On 2nd January, 1964 petitioner came to Sibu and looked for respondent. When they met a quarrel ensued. Petitioner took the youngest child back with him to Kuching. Respondent was left with the two daughters. Later respondent went to work as cook at the Ming Sing Tong, Sarikei.

D.W.3 is the petitioner's mother. She made it clear that she had never interfered with the affairs of the parties. Nevertheless she corroborated respondent's evidence to a large extent. She impressed me as an impartial and truthful witness. I have no reason to disbelieve her.

Petitioner alleged that when he went to Sungei Bidut with Ting Suk Chai (f) (P.W.2) to look for respondent he saw respondent with Sia Wee Ping (D.W.2) at the jetty. Petitioner seems to have a suspicious mind. He inferred that there was some sort of adulterous association between respondent and Sia. This allegation was not specifically pleaded. In any way I find the allegation has no substance at all. I am satisfied beyond any reasonable doubt that any suspicion on petitioner's part is unfounded and unjustified. I have seen and heard D.W.2 who incidentally is respondent's maternal uncle. He impressed me as an honest and truthful witness. I accept his evidence without hesitation.

Petitioner stated that after a quarrel respondent left him holding their baby boy. She

then took away the two daughters. Ting Suk Chai (f) (P.W.2) stated how she was asked to look for respondent. She found her in a speed-boat at a jetty. She told her petitioner wanted her (respondent) to take care of their baby boy. When she came back with the baby boy respondent was gone. Respondent testified that petitioner snatched their baby boy from her during their quarrel and later took the boy to Kuching. She said that she reported the matter to the police. About this incident I find respondent to be evasive and hesitant. While I am not particularly impressed with P.W.2 as a witness I cannot say she was not telling the truth. Further respondent did not call the police to whom she had made a report. In the absence of corroborative evidence I accept petitioner's evidence as regard this particular incident of their baby boy.

The burden of proving desertion is on the petitioner. Desertion is the cessation of cohabitation brought about by the fault or act of one of the spouses. In his petition he alleged that respondent deserted him by leaving the family house in Sibu some time in February, 1962. There is not a shred of evidence to support this. When petitioner left for Kuching in November 1962 respondent and the three children had gone to live at Sungei Ensurai, Sibu. I think he realised the position because when he addressed the court he mentioned that respondent left the house at Sungei Ensurai to work at Ming Sing Tong, Sibu without his consent. It would appear she left Sungei Ensurai some time in August 1963 when petitioner failed to send her money. She said she had written him several letters but received no reply. On the other hand he denied ever receiving any letter from her. At any rate he is under legal obligation to maintain his family. He gave her money on two occasions without being asked. One would expect any reasonable and prudent husband to send home money regularly without being asked particularly when he knows the wife was not working and with three children to look after. He should know approximately how much the family needs.

Prima facie the matrimonial home is where the husband resides: *Milligan* v. *Milligan.*[1] In a sense the husband carries the matrimonial home on his back. It is where he is unless there is good reason why it should not be, e.g. he is a mere sojourner. In this case petitioner went to Kuching and established a business and lived there. Yet he took no step to establish a proper matrimonial home for respondent and the children in Kuching. There is nothing to indicate that his stay in Kuching is of a temporary nature. It is not conducive to a happy family life for spouses to live in two separate places for lengthy periods: Respondent has indicated that if petitioner has set up house in Kuching and invited her to go there she would have gone.

The fact that respondent left the house at Sungei Ensurai does not necessarily mean that she was deserting petitioner. Desertion is not the withdrawal from a place, but from a state of things: *Pulford* v. *Pulford.*[2] She explained her predicament. How she sought her mother-in-law's advice and how she got a job. In my opinion she had just cause for leaving the house after all she had to think of herself and the three children. There is no evidence to show that she ever refused to cohabit with petitioner. On the evidence I hold that petitioner has failed to establish that respondent has the intention to desert, that is the *animus deserendi.* Therefore I would dismiss the petition.

I now come to the question of maintenance. Respondent said that she has not paid any fee to to the District Court, Sarikei. If that is so then she has not taken out summons against petitioner. I think it would be convenient to the parties if I deal with the matter now. I am satisfied that on the evidence respondent is entitled to maintenance for herself and the two children. But the amount asked is clearly excessive. Maintenance must commensurate with the means of the petitioner. Now he has to look after the youngest child. He said he paid someone $50 to look after the child. He said he earned $130 per month. He has two out of seven shares in the barber business. He alleged that he jointly owned the house at Sungei Ensurai left by his father. His mother is not dependent on him. In the circumstances I order him to pay maintenance for respondent and their two daughters $50 a month with effect from 31st December, 1964 and thereafter $50 at the end of each month.

Finally there is the question of custody of the three children. Both ask for custody of the three children. The paramount consideration is the interest of the children. There has not been any suggestion that the youngest child is not properly looked after by petitioner. As to the two daughters I feel that they should remain with respondent. I therefore order that Lee Ley Choo (f) and Lee Ley Hee (f) be given to the custody and care of the respondent and that Lee Siew Tian (m) be given to the custody and care of the petitioner. Should there be any change in the circumstances either party is at liberty to apply to this court regarding maintenance and custody.

Petition for dissolution of marriage dismissed with costs to respondent. I assess costs at $100.

Petition dismissed.